

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 VS. ) No. 4:14-CR-175 (AGF)  
 MARK PALMER, SAMUEL LEINICKE, )  
 CHARLES WOLFE and ROBERT WOLFE, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

MOTION TO SUPPRESS/EVIDENTIARY HEARING  
BEFORE THE HONORABLE DAVID D. NOCE  
MAY 27, 2016  
ST. LOUIS, MISSOURI

FOR THE PLAINTIFF:

JAMES C. DELWORTH  
ERIN O. GRANGER  
OFFICE OF U.S. ATTORNEY  
111 South Tenth Street, Suite 2000  
St. Louis, MO 63102  
(314) 539-2200

FOR THE DEFENDANTS:

SHELBY M. COWLEY  
THE LAW OFFICES OF SHELBY M. COWLEY  
1717 Park Avenue  
St. Louis, MO 63104  
(314) 266-7581  
(Defendant Mark Palmer)

R. TYSON MUTRUX  
MUTRUX LAW FIRM  
1717 Park Avenue  
St. Louis, M 63104  
(314) 270-2273  
(Defendant Mark Palmer)

JASON A. KORNER  
LAW OFFICE OF JASON A. KORNER  
7911 Forsyth Boulevard, Suite 300  
St. Louis, MO 63105

(314) 409-2659  
(Defendant Samuel Leinicke)

J. WILLIAM LUCCO  
CHRISTOPHER P. THRELKELD  
LUCCO & BROWN  
224 St. Louis Street  
P.O. Box 539  
Edwardsville, IL 62025  
(618) 656-2321  
(Defendant Charles Wolfe)

ZACHARY J. BOROWIAK  
THE BOROWIAK LAW FIRM, LLC  
225 S. Meramec, Suite 1100  
St. Louis, MO 63105  
(314) 537-2351  
(Defendant Robert Wolfe)

Proceedings recorded by mechanical stenography;  
transcript produced by computer.

---

DEBORAH A. KRIEGSHAUSER, FAPR, RMR, CRR  
Federal Official Court Reporter  
111 South Tenth Street, Third Floor  
St. Louis, MO 63102  
(314) 244-7449

1 (PROCEEDINGS BEGAN AT 9:00 AM.)

2 THE COURT: All right. In the case of the  
3 *United States against Mark Palmer, Samuel Leinicke,*  
4 *Charles Wolfe and Robert Wolfe,* Case No. 4:14-CR-175, we have  
5 a hearing this morning where -- I guess the conclusion of the  
6 pretrial evidentiary presentation in this matter.

7 Ms. Granger and Mr. Delworth are here for the  
8 United States. Let's see. Who's here for Mr. Palmer?

9 MS. COWLEY: Good morning, Your Honor. Shelby Cowley  
10 and Tyson Mutrux for Mr. Palmer.

11 MR. MUTRUX: Good morning, Your Honor.

12 THE COURT: All right. And -- Oh, all right.

13 MR. KORNER: Jason Korner for Samuel Leinicke.

14 THE COURT: Okay. Is Mr. Palmer here?

15 MS. COWLEY: No, Your Honor, he's not.

16 THE COURT: But he is free on bond.

17 MS. COWLEY: Yes.

18 THE COURT: All right. He -- He -- He could have  
19 been here.

20 Okay. Is Mr. Leinicke here?

21 MR. KORNER: No, Your Honor. We spoke about it.  
22 He's in Iowa. Without evidence being heard this morning, he  
23 made the decision not to come down.

24 THE COURT: All right. That is fine.

25 Let's see. Who's here for Mr. Wolfe, Charles Wolfe?

1 MR. LUCCO: Bill Lucco, Your Honor, here with  
2 Chris Threlkeld, and Mr. Wolfe is present.

3 THE COURT: Okay. All right. Thank you.

4 MR. THRELKELD: Good morning, Your Honor.

5 THE COURT: All right. Thank you.

6 And for Robert Wolfe?

7 MR. BOROWIAK: Your Honor, Zach Borowiak here for  
8 Robert Wolfe.

9 THE COURT: Okay. And he is not present.

10 MR. BOROWIAK: He is not present, Your Honor.

11 THE COURT: Okay. All right. And he is free on  
12 bond.

13 MR. BOROWIAK: Correct, Your Honor.

14 THE COURT: All right. Let me look at or ask  
15 Mr. Delworth: Do you have a presentation to make this morning  
16 with respect to documents?

17 MR. DELWORTH: Your Honor, I can proceed. I guess it  
18 was the Government's motion for a *Franks* hearing, so I was --  
19 so I was getting -- They've got the burden, initial burden of  
20 proof. So I was going to just basically respond to what they  
21 had to present.

22 THE COURT: Well, that's fine. But they -- Correct  
23 me if I'm wrong, and if I'm wrong, I apologize. I was  
24 expecting a presentation of a number of search warrant  
25 documents.

1 MR. DELWORTH: Oh.

2 THE COURT: There was a discussion of 31, I think, or  
3 30.

4 MR. DELWORTH: Yes, Your Honor. I can -- I -- I --  
5 I'll -- I'll have that present in the court. I've -- They've  
6 already been filed. I've got those upstairs. I can -- I will  
7 make copies --

8 THE COURT: Okay.

9 MR. DELWORTH: -- and present all of that -- that --  
10 that to the Court.

11 THE COURT: Okay. They've been filed. Is that what  
12 you said?

13 MR. DELWORTH: Well, they've -- I mean yeah. I mean  
14 when we obtained them in the original case, but I will present  
15 all of those, all of the 31 that have been challenged to the  
16 Court.

17 THE COURT: Okay.

18 MR. DELWORTH: Okay.

19 THE COURT: I thought that's why we were here.

20 MR. DELWORTH: Oh, okay.

21 THE COURT: Now just one second.

22 MR. DELWORTH: Well, Your Honor, ---

23 THE COURT: Just one second.

24 MR. DELWORTH: Okay, sorry.

25 THE COURT: Just one second. I thought we were here,

1 and you were going to present -- There wasn't going to be a  
2 need for officers to testify, identifying the search warrant  
3 documents that were issued and executed and upon which the  
4 Defendants had some arguments to be made about the accuracy,  
5 the -- whatever the -- I'm going to say truthfulness because,  
6 to my recollection, they're not being argued. The affidavits  
7 are not being argued to be falsehoods but are argued to be  
8 constitutionally being filled out and signed under oath by the  
9 officers with reckless disregard for whether or not the  
10 information was accurate. That's my understanding of the  
11 presentation this morning, and we're here for the hearing.

12 Yes, sir.

13 MR. DELWORTH: Okay. I'm sorry.

14 THE COURT: And by "hearing," I believe it was an  
15 idea, you know, expectation that I would listen to  
16 presentations since -- from the -- from counsel about the  
17 matter.

18 MR. DELWORTH: Just for clarification, Your Honor, I  
19 guess the defense have filed a Motion to Suppress the search  
20 warrants. As exhibits to that, they have -- they attached the  
21 search warrants and affidavits. So they are of file -- they  
22 are on file with the Court. I mean I've got ---

23 THE COURT: All 31. I've looked at the -- at the  
24 motions. I've looked at the arguments, --

25 MR. DELWORTH: Yes.

1 THE COURT: -- the briefing.

2 MR. DELWORTH: Right.

3 THE COURT: I have not gone through 31 --

4 MR. DELWORTH: Right.

5 THE COURT: -- search warrants on my monitor.

6 MR. DELWORTH: Right. They -- They were all attached  
7 as exhibits in terms of -- I mean I've got the exhibits here,  
8 but they were all attached as exhibits to the Defendants'  
9 Motion to Suppress Evidence.

10 THE COURT: Okay. I'm not disputing that.

11 MR. DELWORTH: Oh, okay. So ---

12 THE COURT: All right. So you're going to adopt, as  
13 the Government's presentation on those matters, those search  
14 warrants, those documents, those items of evidence that were  
15 attached to the motions.

16 MR. DELWORTH: Yes.

17 THE COURT: Okay.

18 MR. DELWORTH: Yes, Your Honor.

19 The way that the motions have been structured, there  
20 was a Motion to Suppress the Evidence based upon the fact that  
21 the affidavits did not have sufficient probable cause to  
22 support the search warrants. That was kind of bootstrapped  
23 upon an argument being made for a *Franks* hearing and  
24 indicating that should the Court grant the *Franks* hearing --  
25 should the Court grant the *Franks* hearing and provide relief

1 under *Franks* to delete the challenged sections, those  
2 deletions, in addition to some of the challenged arguments set  
3 forth in the motion, would render the affidavits without  
4 sufficient probable cause. As the Court, obviously, is aware,  
5 the basis of probable cause is reviewed on the four corners of  
6 the indictment or the affidavit, rather. There are 31  
7 affidavits. I mean I -- I think that they -- they stand. I  
8 -- The defense made certain challenges on them which I've  
9 addressed in my motion to -- put in my response to the Motion  
10 to -- to Suppress, so I think that they're adequately  
11 addressed there. I'll be happy to answer any questions that  
12 the Court may have. Other than that, I'm basically here in  
13 response to the assertions that have been made with respect to  
14 the *Franks* hearing.

15 THE COURT: Okay. All right. Thank you.

16 MR. DELWORTH: Thank you.

17 THE COURT: All right. Let's see. Ms. Cowley, you  
18 may present your position.

19 MS. COWLEY: Thank you, Your Honor.

20 Mr. Lucco is actually going to speak first for all of  
21 the Defendants.

22 THE COURT: Okay. That's fine.

23 MR. LUCCO: May it please the Court, counsel.

24 Yeah; perhaps I'll add to the clarification of  
25 Mr. Delworth and then add a little more clarification as to



1 how we would like to proceed, Your Honor.

2 THE COURT: All right.

3 MR. LUCCO: We understand we're here today for our  
4 motion for you to at a later time conduct a *Franks* hearing.  
5 We believe that we have ---

6 THE COURT: We're here for a suppression hearing.  
7 And I'm going to take these affi -- the documents into  
8 consideration on the arguments, and I'm also hear for the  
9 arguments made for the *Franks* arguments. Now you may proceed.

10 MR. LUCCO: That was not our understanding, but,  
11 nevertheless, I will so proceed as we have it today. I'm  
12 going to present for the Defendants the portion of the  
13 argument that shows the state ---

14 THE COURT: Okay. Well, let me ask you: Are you  
15 arguing that there's no probable -- Putting aside the *Franks*  
16 arguments, are you saying there's no probable cause for the  
17 issuance of those search warrants on behalf of all of the  
18 Defendants remaining in the case?

19 MR. LUCCO: I'm not sure I understand that question.  
20 I'm sorry. If you -- When you say "putting aside the *Franks*  
21 arguments," ---

22 THE COURT: Let's assume -- Let's assume that the  
23 items in the affidavits that you believe should be extracted  
24 or the Court should consider without considering those  
25 portions of the affidavits that you believe are

1 constitutionally -- should be removed from the Court's  
2 consideration of the propriety of the issuance of the search  
3 warrant, with respect to the issuance of each of those 31  
4 search warrants, is it your argument that there's no probable  
5 cause, putting aside those arguments? So, therefore,  
6 considering those ---

7 MR. LUCCO: It is, Your Honor. It is. But more  
8 importantly, ---

9 THE COURT: No. Wait a second. It is what?

10 MR. LUCCO: We agree. There's no probable -- It is  
11 our argument there's no probable cause.

12 THE COURT: Okay. On what basis?

13 MR. LUCCO: Well, first of all, our -- our position  
14 today is: We have made the substantial preliminary showing.

15 THE COURT: That's not the question I'm asking you.

16 MR. LUCCO: Okay. Well, that's the question --  
17 That's why I thought we were here, Your Honor.

18 THE COURT: We're here, number one -- I'll go back  
19 and review the records, but it's my recollection at the  
20 arraignment of each of the Defendants, each Defendant took up  
21 the Court's suggestion that an oral Motion to Suppress  
22 Evidence be made generally. We're here for that.

23 We're here for the Government's oral motion for the  
24 Court to make a determination of the admissibility or not of  
25 the arguably suppressible evidence. We're here today for the

1 presentation. The arguments have been made. I have read the  
2 briefs regarding the -- the entitlement to challenge those  
3 affidavits based -- based upon *Franks*. I understand the  
4 arguments.

5 MR. LUCCO: I'm not sure. Have you -- Are you  
6 granting us the *Franks* hearing? Because we would --

7 THE COURT: I am ---

8 MR. LUCCO: -- we would call witnesses and prove our  
9 allegations at such a hearing. I'm sorry. I certainly  
10 misunderstood. I can't speak for ---

11 THE COURT: Well, we're going to have to reset it  
12 because you misunderstood what we were here for today.

13 MR. LUCCO: And if I'm wrong and my counsel ---

14 THE COURT: It was my understanding -- It was my  
15 understanding at a time when you all were represented by  
16 counsel, I think it was Mr. Crowe said that the declaration of  
17 Doctor -- What's his name?

18 MR. LUCCO: Kesselring.

19 THE COURT: Kesselring; made the presentation on  
20 behalf of the parties that the affidavits were issued and  
21 signed with reckless disregard for the truth. Is that a fair  
22 statement?

23 MR. LUCCO: That is.

24 THE COURT: What more would you add to that argument?  
25 To that presentation?

1 MR. LUCCO: Well, I would -- I would highlight from  
2 the brief why we think that is reckless. I would counter the  
3 Government's response why they believe it is not.

4 THE COURT: And that's why we're here today. That's  
5 my understanding of why we're here today; also, including  
6 whether or not there's probable cause absent the arguments on  
7 -- based upon *Franks against Delaware*.

8 MR. LUCCO: I think I'm understanding better now,  
9 Your Honor, where you're driving at. I'm going to -- So I'm  
10 going to say: Our intention today is I'm going to make a  
11 presentation about what we believe the evidence shows on the  
12 face of the affidavit and in conjunction with Dr. Kesselring's  
13 declaration that the Government's presentation to the  
14 Magistrates was reckless disregard for the truth.

15 Mr. Borowiak is going to make the second part, if you  
16 will, and he'll state to the Court the implication of that on  
17 probable cause so that we can eventually have a full  
18 evidentiary hearing on the matter.

19 Now if I may, ---

20 THE COURT: I'm going to take a recess at this time.  
21 We'll return at 9:45. I want you all to be sure that all of  
22 this is presented to the Court, and I'll be here for as long  
23 as it takes, but we'll be in recess until 9:45.

24 CLERK: All rise. Court is now in recess.

25 (Court recessed from 9:20 AM until 9:45 AM.)

1 THE CLERK: All rise. This Honorable Court is again  
2 in session. You may be seated.

3 THE COURT: All right. Mr. Lucco, you may begin.

4 MR. LUCCO: Thank you, Your Honor.

5 As I said earlier, I want to address the nature of  
6 the allegations set forth in the affidavit which we believe,  
7 when weighed against the declaration of Dr. Kesselring,  
8 demonstrate a reckless disregard for the truth, and when the  
9 consequences of those are considered, as will be commented  
10 upon by Mr. Borowiak, we're entitled to a *Franks* hearing.

11 I suggest to the Court: If -- If -- If a Magistrate  
12 was handed a document like many of these affidavits are that  
13 are 70, 90 pages in length that have lots of scientific  
14 language in them, chemical compound formulas in them, that if  
15 the Court was also handed at the same time, that Magistrate, a  
16 document that alerted the Court that there would be a person  
17 versed in the field of Chemistry that is reflected in the  
18 analysis between controlled substances and controlled  
19 substance analogues, and that document alerted the Magistrate  
20 as follows, telling them: You will find, Your Honor, that the  
21 statement is, at a minimum, misleading; that the assertion is  
22 false; that no scientific evidence is presented to support the  
23 assertion, nor is there a reference to a study that  
24 substantiates. There's no evidence presented to support the  
25 conclusion. The conclusion is one that is not scientifically

1 justified. This, too, is, at a minimum, misleading. There's  
2 no basis to support the assertion. The assertion is  
3 incorrect. It appears to be a careless replication of text  
4 from uncited source that omits material needed to understand  
5 it. It provides no basis.

6 And you saw that those kinds of statements, alerts,  
7 if you will, were carried over regarding the other affidavits  
8 as well, in general, many of those are repeated, you would  
9 find in others that the expert would tell you in his note that  
10 this just highlights the confusion presented by the affidavit;  
11 that it makes conclusions based on unnamed, undisclosed  
12 studies; that these are unsubstantiated claims; that the  
13 affidavit extends those claims without evidence; that the  
14 affidavit projects those claims again without evidence; that  
15 these are presented without scientific justification and on  
16 and on without repetition or with much repetition due to the  
17 repetitious nature of the allegations asserted over and over  
18 in the many affidavits.

19 I think if -- if a Magistrate knew that, they  
20 wouldn't be granting that search warrant. They'd certainly be  
21 saying: Let's have a hearing. I'm getting some serious  
22 allegations here regarding errors, misstatements, misleading  
23 statements, lacking foundation, no such scientific  
24 justification, false. I'm hearing enough here that makes me  
25 think we ought to have a hearing on this matter because we

1 know the threshold test is: Have we come up with a  
2 substantial preliminary showing? It's only at that next  
3 hearing that we would demonstrate by proof this is true.

4 So I could go back and go through each one of those  
5 characterized statements that are criticisms regarding the  
6 foundational basis of these affidavits, but you can read those  
7 and the Court has read those in Dr. Kesselring's declaration  
8 already. But they go to the heart of the basis for having a  
9 search warrant, thinking there's criminal activity connected  
10 to either controlled substances or controlled substance  
11 analogues either temporarily or permanently scheduled.

12 Now there's also the assertion -- And I think the  
13 Court needs to think in that neutral Magistrate role in this.  
14 You're being presented with this pound of documents but now  
15 you happen to have the crib sheet that alerts you to problems.  
16 You'd be mindful that the affiant in these cases says over and  
17 over, "I know that."

18 So there's another instructive point by  
19 Dr. Kesselring, and he makes the point that much of the  
20 scientific jargon put out in these paragraphs -- and he gives  
21 the -- he gives to the Court the numbered paragraphs -- cannot  
22 be known by someone who isn't well educated in Organic  
23 Chemistry, Biochemistry, Medicinal Pharmacology, a variety of  
24 subjects and fields in which he himself is such an expert, as  
25 set forth in his affidavit.

1 Now the Government responds to that in an effort to  
2 say, "Well, just because all this -- these criticisms exist,  
3 that you're really trying to say that the affiant,  
4 Mr. Anderson or Mr. House or whomever, has to be an expert or  
5 Your Honor has to be an expert to understand these things."

6 We are not saying that; absolutely not saying that.  
7 But the person who says he knows must demonstrate he knows.  
8 And if that knowledge is not of his own expertise and training  
9 and research, then it must be directed to the source of that  
10 knowledge so the Magistrate can determine whether that source  
11 is, indeed, a reliable source. That's all we're saying. That  
12 when you step forward as an affiant and say, "Here,  
13 Your Honor, I know these 93 paragraphs," well, how do you know  
14 that, sir?

15 The Government responds by saying, "Well, this has  
16 clearly been researched." They say that a number of times.  
17 "It's clearly been researched." Well, has it been?

18 The -- The three things I think I can highlight from  
19 our motion is the only cited research is from *Wikipedia* where  
20 they say literally, "According to *Wikipedia*," so forth. That  
21 I don't think this Court or any court is going to take as  
22 reliable scientific source.

23 There's much language in the paragraphs that is  
24 complicated science, and it talks about R1 and R3 positions.  
25 I'm going to use that loosely because Your Honor will see



1 those in a number of the paragraphs of alleged falsehoods;  
2 that what Dr. Kesselring has essentially said was, "This --  
3 The only way I can understand this is I can see" -- he doesn't  
4 use this term; I'm using this term -- "that these were cut and  
5 pasted from other texts; that somebody went somewhere." It's  
6 not attributed. We don't know where that "somewhere" is and  
7 cut-and-pasted comments about some of these compounds.

8 But to further bolster Dr. Kesselring's point that  
9 you need a level of understanding that is not shown in these  
10 affidavits, they cut and pasted in a very inartful way that  
11 included representations to positions in the compounds; that  
12 when you -- when you understand, as Kesselring did, what the  
13 cut-and-pasted text says, you realize it's missing the  
14 illustration or the other documentation necessary to  
15 understand the cut-and-pasted text.

16 The point being that the neutral Magistrate,  
17 regardless of his or her level of scientific expertise, is  
18 being presented with a -- with a document, with an assertion  
19 that really has all the trappings of -- of "I know that." And  
20 then you regurgitate this scientific jargon, and it looks  
21 good. But as Kesselring says, it doesn't mean anything. And  
22 you can't even know it doesn't really mean something or mean  
23 nothing because they haven't presented what you need to even  
24 understand that paragraph.

25 So they -- Over and over Kesselring criticizes them

1 for making conclusions that are not substantiated by  
2 scientific evidence or any evidence that they put forth, nor  
3 are cited to any attributed articles at all. So you have  
4 *Wikipedia*. You have a rather amateurist cut-and-paste job  
5 that is throughout on this particular position, and these  
6 matters are without attribution to cited reliable research or  
7 training.

8 So I counted up at one time 18 assertions just going  
9 through what is called the -- It's Exhibit NI, that affidavit  
10 by Agent House. I counted up 18 of these points that  
11 Dr. Kesselring described in the manner I initially read.

12 Those are repeated throughout. They're repeated in  
13 many forms and in some other paragraphs in Mr. Anderson --  
14 Agent Anderson's affidavit which is Exhibit 5 and, again, in  
15 Agent House's later June, 2014, affidavit which is Exhibit 9,  
16 I believe.

17 So we picked out three affidavits to focus on. We  
18 did that because we believe at this stage, Your Honor, we  
19 simply have -- we have the threshold of substantial showing,  
20 preliminary showing. It's anticipated that if the Court  
21 agrees that the accusations of recklessness are sufficiently  
22 severe, that they need to be tested at a hearing, that we  
23 would get that hearing, and at that point we would demonstrate  
24 these things clearly to the Court.

25 So I must say in an interest of being short here, not

1 making -- going over, obviously, matters the Court has read, I  
2 believe that when you cite these things -- Maybe Kesselring  
3 has not used magic words. Maybe he's not said, "This is  
4 falsehood; this is a lie; this is reckless," but when you look  
5 at the litany of these where he uses terms over and over as  
6 "at a minimum, misleading," he says at one point "false," at  
7 one -- at many times, "incorrect," that the overall  
8 presentation to the Magistrate is reckless in nature, and it  
9 includes many misleading, incorrect, and I would suggest to  
10 the Court reckless statements that -- on which the -- the  
11 affidavit -- I'm sorry -- the warrants would be founded.  
12 These were foundational parts of the affidavit. They go to  
13 the controlled substance analogue aspect of this, to the heart  
14 of it, which is what the heart of this case is about. It has  
15 peripheral size. I understand that. But we're here because  
16 of the controlled substance analogue matters, and these go to  
17 the heart of that.

18           The person did not show the training; nothing in the  
19 affidavit about their experience and training; cited to  
20 anything that would have given them the personal ability to  
21 know these things. It's quite fine for them to have recited  
22 to other sources but they don't. It's almost as if they act  
23 like they have this information; they know this information.  
24 That simply cannot be.

25           So, Your Honor, for those reasons, I think we've

1 established preliminary -- a preliminary showing of  
2 recklessness on the part of these affidavits. And  
3 Mr. Borowiak is going to comment on the implication of those  
4 on the -- on the probable cause.

5 THE COURT: All right.

6 MR. LUCCO: Thank you.

7 THE COURT: Thank you. Thank you very much.

8 Mr. Borowiak, go ahead.

9 MR. BOROWIAK: Yes, Your Honor. Thank you very much.

10 Your Honor, Mr. Lucco laid out the -- the reasons for  
11 *Franks* relief. And the second half of the analysis has to do  
12 with: If the language in question is, in fact, found to be  
13 reckless and it's ultimately removed from the affidavits in  
14 question, does probable cause remain within those affidavits?

15 The foundational language, which is attacked here, is  
16 very important because a great deal of what the Government is  
17 contending and what is mentioned within the four corners of  
18 the affidavits that were presented to the Magistrates, the  
19 overwhelming majority has to do with controlled substance  
20 analogues. Because it's an analogue, this substance has to be  
21 spun through that additional step of the 802(32)(A) analysis.  
22 Is it chemically similar? And does it have the chemically --  
23 or a similar effect on the human body?

24 If the Government cannot establish in its affidavits  
25 that those items are, in fact, similar, then you're removing

1 any live criminality to those -- to those substances. And  
2 they are, in fact, then just that; substances without any  
3 criminality attached to them.

4 It's -- It's easy in a drug case having to do with  
5 cocaine or methamphetamine to -- to, in fact, say, "Okay, it's  
6 a controlled substance because it's scheduled." But in this  
7 case, because you have a grand overwhelming number of  
8 substances that are, in fact, alleged to be controlled  
9 substance analogues, they have to be spun through that  
10 additional analysis.

11 Now if that is removed, as I said, that's one reason  
12 why the affidavits would fail to show probable cause to the  
13 Court.

14 Another reason is that, Your Honor, we're attacking,  
15 I believe it was, 24 search warrants here. And the way that  
16 they're structured is that you have Exhibit 1 which, I  
17 believe, is in June of 2013 and then your last one, which was  
18 attached to the *Franks* motion, which is Exhibit 9 was in June  
19 of -- excuse me -- executed in June of 2014.

20 Each affidavit in between piggybacks upon the  
21 findings of the search warrant that was executed before it.  
22 So if the first affidavit fails for probable cause and the  
23 next affidavit is used in order to show the Court that there's  
24 additional criminal conduct or a light of criminal conduct  
25 there, well, that -- that information then shall be removed as

1 well. So there's this cascading waterfall effect that follows  
2 through each one of the affidavits that we're challenging.

3 In addition, Your Honor, one of the points that we  
4 make in our Motion to Suppress is that once this reckless  
5 language is removed, what you're left with is discussions and  
6 interactions between individuals and businesses.

7 Now what we have, there's basically discussions as to  
8 people who may be involved in other cases, their interactions,  
9 interactions between our clients, interactions between  
10 third-parties. They're painted with this brush of having, you  
11 know, dealing in synthetic drugs, dealing in synthetic  
12 narcotics. But, again, there's this vague understanding as to  
13 what synthetic narcotics are we talking about. It creates a  
14 real ambiguity. And one of the interesting things in this  
15 case, and as each one of these affidavits proceed, is that the  
16 types of what can be under the umbrella of synthetic narcotics  
17 or synthetic drugs is actually three kinds of substances. Are  
18 we talking about controlled substance analogues that have to  
19 be analyzed under the 802(32)(A) analysis? Are they  
20 substances that have been emergency scheduled? Or are they  
21 substances that are particularly listed just as scheduled  
22 substances within the Controlled Substances Act?

23 And that is not clear. There's an ambiguity that's  
24 created there, Your Honor, which leaves nothing but, you know,  
25 interactions between individuals that are colored in any light

1 of criminality. And if they're not colored in that light, the  
2 Magistrate would not be led to believe that you would find  
3 evidence of criminal conduct or contraband in any of the  
4 places that are meant to be searched.

5 In a -- In a civil context, Your Honor, if -- you  
6 know, the phrase is, you know: Ambiguity is construed against  
7 the drafter. Obviously, this is a criminal case. So what's  
8 the remedy? What remedy do you have when something like this  
9 comes up?

10 The Court is allowed to take a step, when examining  
11 the information provided to it in the affidavits within the  
12 four corners of the document, to use the totality of the  
13 circumstances provided to it and of that would include the  
14 knowledge and reliability of the affiant. And I would propose  
15 to the Court that once the affiant is shown to be reckless,  
16 any other assertions that the affiant may make should be seen  
17 in a different kind of light; that he's speaking in these  
18 broad terms of, you know, individuals talking to one another  
19 for the purpose of, you know, dealing or trafficking in  
20 synthetic drugs, but then, again, he can't exactly say what it  
21 is. And if you can't say what it is, you can't say what  
22 statute is actually being violated. And if you can't  
23 establish that, you can't say that there's any illegal  
24 activity going on.

25 So, Your Honor, for those reasons and the cascading

1 effect that occurs once you start picking apart each one of  
2 these, you'll see that the affidavits -- again, Exhibit 1 and  
3 going all the way through Exhibit 9 -- start to fall apart.  
4 And once you start picking apart earlier parts of these  
5 affidavits, the latter ones begin to fall apart. And that's  
6 why, Your Honor, there's no probable cause remaining after the  
7 *Franks* determination is made and the language is found to be  
8 reckless.

9 THE COURT: All right. Then the question I have is  
10 one I had posed earlier: Putting aside the *Franks* argument,  
11 do you have a basis for arguing or are you arguing also that  
12 there's no probable cause, even accepting the information in  
13 the affidavits that you're challenging now?

14 MR. BOROWIAK: Your Honor, it's -- it's our position  
15 today that based ---

16 THE COURT: This is today. This is the time --

17 MR. BOROWIAK: Okay.

18 THE COURT: -- when the Court receives the  
19 evidentiary information it needs and the argument it needs to  
20 establish whether or not the items seized in the execution of  
21 the search warrants -- And by saying that, also, I assume  
22 there's no issue with the execution of the search warrants.  
23 What has been challenged is the issuance of the search  
24 warrants; that that evidence should be suppressed. So the  
25 arguments are the scientific arguments, and they're



1 substantial. I'm only wanting to know: Do you have any other  
2 argument that the affidavits do not establish probable cause?

3 MR. BOROWIAK: Your Honor, I -- at this time I have  
4 nothing to present to the Court with that matter. However,  
5 Your Honor, we are not, as the defense counsel in a group, are  
6 not prepared to argue that -- that specific point today,  
7 Your Honor, because it was our understanding that we were  
8 arguing the *Franks* motion.

9 THE COURT: Rule 12(g) -- I think it is Rule 12(g) --  
10 says if you don't put it in before the District Court before  
11 trial, it's waived, can be held to be waived when you -- if  
12 the matter goes to trial.

13 MR. BOROWIAK: Your Honor, may I have a moment to  
14 confer with --

15 THE COURT: Sure.

16 MR. BOROWIAK: -- Government counsel?

17 (Pause)

18 THE COURT: And I do want to correct the record. It  
19 wasn't 12 -- Rule 12(g). It's Rule 12(c) about the Court  
20 setting deadlines, extending or resetting deadlines upon -- as  
21 the Court determines; consequences of not making a timely  
22 motion under Rule 12(b) (3) which includes Motions to Suppress.

23 Okay. I just want to know -- I mean everyone has had  
24 a long time, I think, to file Motions to Suppress. And I just  
25 want to know if there's anything else. I want the record to

1 be clear about whether or not there's anything other than the  
2 arguments that have been made this morning and that are in the  
3 pending motions.

4 MR. BOROWIAK: Your Honor, to the point that the  
5 Court is making it if there's any additional information that  
6 we would be arguing for a specific Motion to Suppress,  
7 Your Honor, we -- as I said earlier -- And I understand, you  
8 know, the Court's position on it, you know, because, you know,  
9 as I said after conferring with counsel, you know, we at this  
10 time are not ready to get into the -- the issue of whether or  
11 not the affidavits on their own would have any -- any issues  
12 that could be challenged as a suppression issue. And,  
13 therefore, Your Honor, we would be asking this Court for  
14 additional time to be able to come back and argue those  
15 specific points that we could be making.

16 Through looking at the affidavits, there may be some  
17 -- some points that we would like to make with the Court, but  
18 as that -- our preparation for today was for the specific  
19 *Franks* motion and this subsequent Motion to Suppress that we  
20 had previously filed with the *Franks* motion, we would be  
21 asking the Court for more time to ---

22 THE COURT: Well, you're going to have to show me  
23 good cause, and you're going to have to put together a motion.  
24 I'm not going to grant you time to supplement the motions that  
25 have been filed. This case was filed in 2014. Counsel have

1 been in the case for a long time. The Court has reset the  
2 deadlines for good cause because there's a lot of evidence, a  
3 lot of information, 31 search warrants as I understand. You  
4 referred to 29. I think you referred to 29.

5 MR. BOROWIAK: I think it was 24, Your Honor.

6 THE COURT: Pardon?

7 MR. BOROWIAK: 24, Your Honor.

8 THE COURT: 24.

9 MR. BOROWIAK: Yes.

10 THE COURT: There are 24 search warrants that you're  
11 contesting?

12 MR. BOROWIAK: Yes. And they are in our exhibit -- I  
13 believe it's Exhibit 10 that was filed with the *Franks* motion.  
14 It -- It lists in a graph each one of those --

15 THE COURT: Okay.

16 MR. BOROWIAK: -- search warrants.

17 THE COURT: Now Mr. Delworth refers to 31 search  
18 warrants. So are you not contesting seven search warrants?

19 MR. BOROWIAK: Your Honor, the search warrants that  
20 we're just contesting are those that are outlined in our  
21 Exhibit 10.

22 THE COURT: Because I'm going to provide  
23 Judge Fleissig with a Report And Recommendation. It may be  
24 long and extensive, but then I'll be done with the case. So  
25 now is the time and has been for almost two years to present

1 the Court with Motions to Suppress.

2 MR. BOROWIAK: Your Honor, may I have one more moment  
3 to confer with my co-counsel?

4 THE COURT: Sure.

5 MR. BOROWIAK: Thank you.

6 (Pause)

7 MR. BOROWIAK: Your Honor, thank you for your  
8 patience.

9 Your Honor, we have -- at this time we have no other  
10 suppression issues to bring before this Court. That being  
11 said, Your Honor, if the Court were to, in fact, grant a  
12 *Franks* motion and a hearing would be held, if anything was  
13 discovered at that time, defense counsels and Defendants would  
14 like to reserve the right to bring anything that may come up  
15 through those materials.

16 THE COURT: Now -- All right. You keep talking about  
17 a *Franks* hearing. The Court -- And I want to be sure that we  
18 all understand what's transpiring today. The information --  
19 and it's been repeatedly said, even today; what I'm about to  
20 say has been affirmed -- that the argument based upon *Franks*  
21 is the -- the entitlement -- You have no other scientific  
22 evidence to offer other than the declaration of  
23 Dr. Kesselring. Is that a fair statement?

24 MR. BOROWIAK: Yes, Your Honor, just the affidavit  
25 provided by, --

1 THE COURT: Okay.

2 MR. BOROWIAK: -- yes, Dr. Kesselring.

3 THE COURT: Okay. And I have not studied his  
4 declaration enough to -- and compared it with the affidavit  
5 and to be near to making any kind of a conclusion. But if I  
6 were to determine that the affidavits are legally sufficient  
7 under the Fourth Amendment and recommend that the Motion to  
8 Suppress -- Motions to Suppress be denied, this is -- you have  
9 nothing else to offer --

10 MR. BOROWIAK: That is ---

11 THE COURT: -- in the way of showing entitlement to a  
12 *Franks* hearing.

13 MR. BOROWIAK: That is correct, Your Honor.

14 THE COURT: Okay. All right. Now what about the  
15 other seven search warrants?

16 MR. BOROWIAK: Your Honor, I am not -- I'm unclear as  
17 to why the Government says there are 31 and we say there are  
18 24. I think the rest of us are as well. Do you mind if I  
19 inquire of Jim Delworth --

20 THE COURT: No; surely. Surely.

21 MS. COWLEY: -- as to why they have an additional  
22 seven?

23 THE COURT: I don't want Judge Fleissig to be  
24 surprised perhaps at a trial or at some future argument that  
25 evidence acquired through the execution of the search

1 warrant -- Let's just say No. 27 outside the 24 --

2 MS. COWLEY: Yes.

3 THE COURT: -- is going to be offered against  
4 Defendant So-And-So, and suddenly the argument is made, "Well,  
5 that evidence should be suppressed because, you know, for  
6 whatever reason."

7 MR. BOROWIAK: Understood, Your Honor.

8 THE COURT: Okay.

9 MR. BOROWIAK: Just one moment. Thank you.

10 (Pause)

11 THE COURT: Okay. Maybe I should have, also,  
12 Mr. Delworth up there and -- because it's not unusual for the  
13 Government and the parties to say, "Well, certain items are  
14 not being challenged," or, "We're not going to offer this  
15 evidence at trial," or whatever which would limit the scope of  
16 the Court's decision-making needs. So ---

17 MR. BOROWIAK: Your Honor, after speaking with  
18 defense counsels and Mr. Delworth, it is our position that the  
19 only warrants that we are challenging are those 24 that are  
20 referenced in our Exhibit 10.

21 THE COURT: Okay.

22 MR. BOROWIAK: With regards to other warrants, we  
23 understand that there may have been other warrants executed in  
24 the universe of the four indictments that this case is -- that  
25 this case is a part of it, but we are not challenging those

1 other items in the scope of these motions.

2 THE COURT: Okay. All right.

3 And let me ask you, Mr. Delworth: You're aware of  
4 the 24 search warrant files that Mr. Borowiak has referred to.  
5 Is that correct?

6 MR. DELWORTH: Yes. They were all attached as  
7 exhibits to the defense motion.

8 THE COURT: Okay. Do you intend to offer, if the  
9 case were to go to trial, to any of these Defendants in this  
10 case evidence acquired from any of the other search warrants?

11 MR. DELWORTH: I'd have to check the -- the 12(b)  
12 notice. I think the -- I think the 24 encompasses this case  
13 is my -- is my best understanding. I probably have to check  
14 my 12(b) notice to be absolutely sure in terms of that answer.

15 THE COURT: Okay. I -- Just I want to know, you  
16 know, --

17 MR. DELWORTH: Sure.

18 THE COURT: -- what we're talking about today so that  
19 I can address the issues regarding whether or not evidence of  
20 the Government ought to be suppressed or not.

21 MR. DELWORTH: Sure.

22 THE COURT: All right. Do you have a response to  
23 what Mr. Lucco and Mr. Borowiak have said?

24 MR. DELWORTH: Yes, Your Honor.

25 As the Court is aware -- I ask its indulgence -- in

1 terms of *Franks v. Delaware*, the Supreme Court indicated it's  
2 really a two-prong test. And in order to obtain relief under  
3 *Franks*, there has to be a demonstration that a law enforcement  
4 official deliberately or recklessly included a false statement  
5 or omitted a truthful statement from the warrant affidavit.

6 Secondly, in order to get a *Franks* hearing, the --  
7 there has to be a finding by the Court, a determination, that  
8 the allegedly false statement was necessary to a finding of  
9 probable cause.

10 It would be the Government's position that they have  
11 not met either prong of *Franks*.

12 With respect to Mr. Lucco, he kept indicating  
13 "recklessness," and I think summed it up by saying, "We've  
14 shown a preliminary showing of recklessness." Number one, I  
15 want to address that these affidavits were in no way reckless.  
16 The affiants were in no way reckless. But just on that  
17 statement alone, that's not what the standard is. It's that  
18 -- that the affidavit is somehow reckless. It said reckless  
19 -- "recklessly included a false statement." And during  
20 Mr. Lucco's recitation, at no point did he indicate a false  
21 statement. He made a lot of generalizations about whether  
22 there were scientific justifications or whether the  
23 information can properly be digested without citations;  
24 whether they have the specific scientific knowledge. All of  
25 that is irrelevant to a *Franks* hearing. It's -- The focus is



1 whether there is a false -- whether there's a false statement  
2 or not.

3 And, Your Honor, in terms of that, what I would like  
4 to do is: I've just marked these as Government's Exhibits 1,  
5 2, and 3, although the Court already has these, if I -- if I  
6 may approach.

7 THE COURT: All right.

8 MR. DELWORTH: These are the three affidavits that  
9 are referenced in Dr. Kesselring's affidavit, Government  
10 Exhibit 1 being what the defense has described as the "Orchard  
11 Drive affidavit." And it is an affidavit that actually  
12 encompasses a number of locations; some locations on  
13 St. Charles Rock Road; a number of different office suites; a  
14 Williamstown Drive as well as Orchard Drive. So Orchard Drive  
15 is just one of a number of search warrants supported by this  
16 affidavit.

17 But as the Government has -- has indicated in its  
18 response and gone through, what the Government has done is  
19 basically highlighted what it has turned over to you. And by  
20 the way, these are -- Government's Exhibits 1, 2, and 3, the  
21 affidavits, are already part of the Defendants' motion. I've  
22 provided defense counsel with these and highlighted. But if I  
23 -- if I may direct the Court's attention, Government's  
24 Exhibit 1, it's basically what's highlighted on Pages 16, 17  
25 and also on Page 25.

1           Throughout Dr. Kesselring's -- That's essentially  
2   what Dr. Kesselring attaches. Now with the exception of Page  
3   25 I'll get to in a minute, this is all within a section of  
4   the affidavit that is entitled "Controlled Substance  
5   Analogues." And basically these are what I consider "case of  
6   first impression" from the Court, and we wanted in the  
7   affidavit to provide some type of background to the Court in  
8   terms of dealing with controlled substance analogues and what  
9   they are and the difficulty with them.

10           The controlled substance analogues, specifically in  
11   the synthetic drug context, has really hit the United States.  
12   We try to play catch-ups. So there's been a series of not  
13   only a -- a statutory mandate but also scheduling to try to  
14   keep pace with some of these drugs.

15           The majority of the drugs that are talked about and  
16   the focus of the search warrant, such as JWH-018, AM2201 and  
17   drugs such as that, at the time of this affidavit are already  
18   scheduled. They're either scheduled through the Controlled  
19   Substance Act or they're emergency scheduled. So you're  
20   really only talking about really two drugs that are controlled  
21   substance analogues, but it gives some history in terms of  
22   what you're dealing with in controlled substance analogues.

23           Now Dr. Kesselring, most of his affidavit is spent  
24   saying, well, he doesn't agree that there -- There should be  
25   citations. There should be -- He's viewing it from a

1 scientific -- from a scientific standpoint. But in terms of  
2 Dr. Kesselring's -- In terms of -- Excuse me; let me get my  
3 paper.

4 In terms of Dr. Kesselring's actual assertions,  
5 there's only one time that he actually says something is  
6 false. And that is an assumption that he actually makes;  
7 whereby in Paragraph 7 of his affidavit, he indicates that --  
8 I'm quoting -- "Moreover, the term 'structurally related' used  
9 in Paragraph 21 in the Orchard Drive affidavit is not a term  
10 that is defined, nor does it have precise scientific meaning."  
11 And let me just address even that statement.

12 Basically a "controlled substance analogue" is a  
13 definition found in Section 801 as cited here in Title 21, and  
14 it defines what a "controlled substance analogue" is. There  
15 has to be two findings. It's basically substantially similar  
16 in chemical make-up and, number two, it's substantially  
17 similar from a pharmacological effect or held out to be  
18 substantially similar from a pharmacological effect. Those  
19 are not scientific terms. Those are set forth in the statute.  
20 That is to be determined by a -- by a jury in a finding at  
21 trial. So when he mentions that they don't have any precise  
22 scientific meaning, he is correct. It's part of a statute  
23 that is to be utilized by the -- by the -- by the Court.

24 He goes on to say, "If the affidavit intends to  
25 suggest that the 'structural relationship' it claims AKB48 and

1 5F-AKB48 to have with other synthetic cannabinoids such as  
2 Schedule I substances JWH-018 and AM2201," it goes on to say,  
3 "then that assertion is false." So in other words, he's  
4 saying if the affidavit intends to suggest. So he's basically  
5 reading it and saying, "Well, if this is what they mean, then  
6 that is false." But that's not what -- what it says, nor is  
7 it what is suggested, that AKB48 or 5F-AKB48 are meant to  
8 necessarily be controlled substance analogues of JWH-018 and  
9 AM2201. In fact, those are the two primary substances that  
10 are discussed with respect to Orchard Drive.

11 AKB48 at the time was scheduled. You have at the  
12 time that this affidavit was -- was done. So what you're  
13 dealing with is 5F-AKB48 which is a controlled substance  
14 analogue. At no time does Dr. Kesselring in any part of his  
15 affidavit ever say that it is false; that what we're claiming  
16 could be considered a controlled substance analogue is not a  
17 controlled substance analogue. He just says he doesn't like  
18 this -- he doesn't like the basis for the conclusion that --  
19 whether there's sufficient scientific support. He never says  
20 that those conclusions regarding whether they could be  
21 considered controlled substance analogues for the purpose of  
22 this statute is in any way -- is in any way incorrect.

23 He also -- He indicates that, well, we should have a  
24 lot more citations to studies and things like that because  
25 there is reference that *in vitro* studies show AKB48 similar to

1 Delta 9-THC. He is correct. I mean there the -- I think that  
2 there was an indication that the only citation was the  
3 *Wikipedia*. There is that citation in *Wikipedia*, but there's  
4 also *1, 2 Forensic Toxicology* in -- in 2013. There is mention  
5 of scientific literature. That's on Page 17, by the way,  
6 *Forensic Toxicology*. So from Dr. Kesselring, maybe there  
7 isn't enough citation or background for him, but the key point  
8 is: At no point does he say that -- does he say that that  
9 conclusion is false.

10 During -- He also -- Dr. Kesselring, I want to point  
11 out, through a lot of it makes a -- makes a mistake where he  
12 basically reads into the affidavit or the findings an  
13 additional element that's not found.

14 In terms of what we're dealing with with controlled  
15 substance analogues, it's -- the definition is under Title 21,  
16 United States Code, Section 802(32)(A). That's the definition  
17 that cites -- That specific statute is actually cited in our  
18 affidavit.

19 Dr. Kesselring points out; he says, "Well, do these  
20 substances that we're referring to in the affidavit constitute  
21 Cannibimimetic" -- C-A-N-N-I-B-I-M-I-M-E-T-I-C -- "Agents as  
22 set forth in Title 21, United States Code, Section  
23 812(d)(2)(A)?" He's basically saying, well, the substances  
24 we're citing don't meet that statutory definition. It doesn't  
25 need to. We never cite it in the affidavit; never use it as a

1 basis throughout this affidavit. He spends a lot of time  
2 discussing whether any of these substances could fit those  
3 classes of -- recognized classes of Cannibimimetic Agents.  
4 That was just an attempt by Congress under that to kind of  
5 expand this class because you're dealing with all these  
6 synthetic drugs and how are we going to deal with them in  
7 terms of scheduling, and they have this additional provision;  
8 one that doesn't apply here.

9 So Dr. Kesselring spends a lot of time saying, "Well,  
10 they don't meet these classes." They don't have to. It's --  
11 It's -- It's simply irrelevant.

12 Dr. Kesselring -- Basically what they're claiming  
13 their basis for is he'll claim that argument that -- that  
14 claim that *in vitro* pharmacological activity or AKB48 were  
15 found to be true, and there's no evidence presented in -- to  
16 support a conclusion that 5F-AKB48 would have similar  
17 pharmacological activity. Well, he never states that that's  
18 false. Again, he keeps saying that -- that, "Well, how -- you  
19 know, what is your basis -- basis for showing that," which is  
20 -- which is a far different standard.

21 In a lot of these synthetic drugs, there are new ones  
22 that are appearing on the market all the time. There's  
23 hundreds of synthetic drugs. What you're talking about in  
24 terms of pharmacological impact is you can't -- in order to  
25 take one of these new drugs into a pharmacological study, it

1 may take years. In the meantime they're out on the streets.  
2 People are getting high on them.

3 What the affidavit indicates is that in some cases  
4 you can make a -- basically a discerned judgment based upon  
5 the structure and make-up of the chemical that it's going to  
6 have this sort of pharmacological effect, and you're allowed,  
7 I think in the affidavit, as indicated, to make that  
8 inference.

9 Well, we're talking about the affidavit. All of this  
10 is just set forth in terms of background. And we're only  
11 talking about basically two out of a whole class of substances  
12 that are encompassed within that affidavit, the majority of  
13 which are actually -- such as JWH-018, XLR11, AM2201, are --  
14 have all been in some manner scheduled either through  
15 emergency scheduling or -- or under the Act at this time.

16 What I also wanted to do with respect to this is --  
17 And that's the sections on Page 16 and 17 in the affidavit.  
18 Page 25 of that affidavit indicates AKB48. It's a synthetic  
19 cannabinoid controlled substance analogue per DEA Control No.  
20 1701.

21 Dr. Kesselring correctly points out that 7201 is the  
22 one for AM2201. It should have referenced DEA Control No.  
23 7048 which involves AKB48. But, again -- again, he doesn't  
24 state that it's not a controlled substance analogue. He's  
25 just, "Well, you've got this control -- You -- You've simply

1 got this control number wrong."

2 I also with respect to the second prong of this, when  
3 I'm dealing with the Orchard Drive affidavit, want to indicate  
4 in terms of the second prong in *Franks* is: Even -- Even if  
5 you are assuming that what they're saying is correct -- we in  
6 no way accept that; we challenge every portion of it -- is:  
7 Okay; well, what happens if you delete that?

8 If you delete this, you can even delete the whole  
9 section on controlled substance analogue. It's just meant to  
10 give the Court some background in terms of what we're dealing  
11 with and the scheduling efforts that were being taken for it.  
12 You don't even have to have this in the affidavit. None of  
13 this is an attack on the details of the investigation which in  
14 terms of the Orchard Farm affidavit probably consist of close  
15 to 50 pages or so in terms of actual factual background, none  
16 of which -- none of which is actually being challenged.

17 The Government Exhibit 2, which I believe is the  
18 Yahoo affidavit, basically Dr. Kesselring is challenging the  
19 same segments as in the Orchard Drive. Obviously, in these --  
20 in these affidavits, again, in the Yahoo one, it was under  
21 control substance analogue where there is virtually identical  
22 information providing, you know, the introduction to synthetic  
23 controlled drugs, efforts that were made to schedule it. We  
24 have set forth the definition of "controlled substance  
25 analogues" and how -- tried to address in terms of new drugs,



1 how they would fit within the category of -- of controlled  
2 substance analogues and meet that definition.

3 Mr. Lucco indicated, well, Dr. Kesselring attacked  
4 that we referred to, the R1 and R2 positions, and how reckless  
5 that was because we can't do it with an illustration. Well,  
6 what we did was indicate that they're substituted at the 1-  
7 and 3-positions which actually has meaning in terms of  
8 chemical -- in terms of chemical parlance where the 1 and 3  
9 are. Again, not that this is false but, well, you could have  
10 given an illustration of it. An illustration wasn't -- may  
11 have been more helpful, but it was defined in there; that  
12 their R1, meaning the 1-position, R3 meaning the 3-position in  
13 terms of an atomic structure of -- of chemical. So, once  
14 again, not something that's false.

15 Dr. Kesselring -- let's see -- indicates that, well,  
16 we -- it's clearly reckless because XLR11 and UR144 are named  
17 as separate substances because in Paragraph 25 of the Yahoo  
18 indictment we mention, but if you read the beginning of the  
19 Yahoo indictment, the beginning paragraph says, "XLR11, (also  
20 known as 5F-UR144, also known by the chemical name)." So we  
21 defined that it's also known as this, but then we referred to  
22 it as XLR11 and UR144 which is sometimes the way that it's --  
23 in other words, we're addressing the same type of -- same type  
24 of chemical.

25 Once again, in the Yahoo, I've highlighted in yellow

1 the extent to which this is being challenged as -- as in  
2 somehow -- somehow misleading, again, which we state that it's  
3 not.

4 Finally, Government Exhibit 3, which is the Winding  
5 Staircase, without -- without going through, again, they're  
6 essentially the very same -- same arguments, the one argument  
7 they make is that -- He refers to core indole and core  
8 indazole structures. The difference between core indole  
9 structures in Chemistry and indazole is that in an indole, you  
10 have a claim where there's a carbonate -- carbon atom. In an  
11 indazole, that's a substitute for a nitrogen atom.

12 As a matter of fact, now we're seeing in synthetic  
13 drugs where we're seeing chemicals that -- two different  
14 chemicals; one having an indole core, another indazole core.  
15 They're both synthetic cannabinoids. They're both -- They're  
16 -- They're both -- They're both related. So there's a lot  
17 made that has really actually no significance in the case.

18 Finally, in that affidavit they -- we indicate  
19 that -- that based on the structure activity relationship  
20 studies, PB-22 and 5F-PB-22 are expected to have similar  
21 effects.

22 Again, obviously, Dr. Kesselring, as a chemist, would  
23 like there to be a couple years of study in order to make it,  
24 but we don't have a couple years' worth of study. What we can  
25 do is take a look from a legal standpoint and say: They have

1 basically the same type of structure. We, based upon our  
2 knowledge of Chemistry and how similar chemical structures  
3 act, we would anticipate that this would have -- be expected  
4 to have -- have to have similar effects.

5 In totality, Your Honor, the -- what Dr. Kesselring  
6 saw, number one, nothing in there is false; nothing.

7 Second, the fact that Dr. Kesselring would like more  
8 sources or feels that there should have been a better  
9 explanation, that's not the standard for a *Franks* hearing.  
10 That's his review of it based as a -- somebody scienced in  
11 Chemistry.

12 Secondly, in terms of the second prong, you could  
13 take this whole section out and it wouldn't -- it wouldn't  
14 impact the search warrants. It would have the same effect.  
15 As a matter of fact, Mr. Borowiak in his statements said,  
16 "Well, if you take all of that out, then you really have only  
17 people engaged in just -- in just, you know, person-to-person  
18 or business conversations." Obviously, the Court will review  
19 the affidavit. I think it speaks for itself, but it's  
20 anything but -- but normal business relationships. But he  
21 says, "Well, what you have to do is this finding of controlled  
22 substance analogue."

23 This is based upon a finding of scheduled controlled  
24 substances and also controlled substance analogues. In the  
25 Orchard Drive affidavit, Page 26, it makes reference to a

1 seizure that was tested to be XLR11 as does Page 27 in the  
2 affidavit, as does Page 51 of the -- of the affidavit, all  
3 involving seizures or warnings then of scheduled controlled  
4 substances. You're dealing with both. Schedule controlled  
5 substances, what these groups did, as explained in the  
6 affidavit, was they tried to be -- they tried to stay a step  
7 ahead of the schedule. They didn't always do it because a lot  
8 of the substances were scheduled at the time but tried to move  
9 on to these -- to these controlled substance analogues.

10 Finally, Your Honor, with respect to Mr. Borowiak's  
11 statements and the argument in this case, the defense Motion  
12 to Suppress -- to Suppress Evidence indicates basically a  
13 two-step process; is that it's continued basically upon the  
14 Court finding a *Franks* hearing and contingent, in essence,  
15 upon the Court then granting some type of *Franks* relief  
16 because the -- Just one moment, Your Honor.

17 THE COURT: All right.

18 MR. DELWORTH: Oh, I'm sorry. I have it right here.

19 The Motion to Suppress evidence, in the  
20 "Introduction," if you read -- if you follow through, it  
21 basically reiterates the fact that they believe that there  
22 were reckless statements on behalf of the affiants that were  
23 false, inaccurate or misleading, and the affiants were not  
24 qualified. And they indicate, "When *Franks* relief is granted,  
25 statements removed from the supporting affidavits, the Court

1     awarding that relief should then revisit the original search  
2     warrant affidavits to determine whether it -- whether there's  
3     still sufficient basis to support a probable cause finding."

4             So there is basically nothing in here that says that  
5     the affidavits on their face are bad outside of their *Franks*  
6     claim. The -- The affidavits are -- are legitimate.

7     Basically the linchpin of this case for them is the *Franks*  
8     hearing; that they need a *Franks* hearing to get *Franks* relief  
9     to say then, "Go ahead and review the affidavits." But the  
10    affidavits by themselves clearly have -- have sufficient  
11    probable cause.

12            Judge, I know I've spent some time, but just -- just  
13    finally in conclusion -- conclusion and summary: What our  
14    response shows, I've taken detail by detail of  
15    Dr. Kesselring's affidavit. I've cited it, the various  
16    paragraphs and what he attacks in the affidavit, and I've  
17    shown that none of his claims are demonstrated to be in any  
18    way false or -- or untruthful. The only thing that  
19    Dr. Kesselring can say is false is an assumption that he  
20    makes, not an assertion set forth in the affidavit itself.  
21    The affidavits clearly have sufficient support for a probable  
22    cause finding. There is no -- There is no misleading or false  
23    information involved. But even if you were to somehow even  
24    take that out, it is not going to impact the probable cause  
25    determination for these affidavits. Thank you.

1 THE COURT: All right. Mr. Lucco, do you have any  
2 reply?

3 MR. LUCCO: Very briefly, Your Honor.

4 It's noted at this point: Other than counsel's  
5 argument, they have -- they have submitted nothing of a  
6 scientific nature to rebut Dr. Kesselring. I would expect  
7 that if we have a *Franks* hearing, that we may have some of  
8 that. I'm not certain.

9 But Mr. Delworth makes -- makes a nice argument.  
10 What he says is, as an example, in the Orchard Drive  
11 affidavit, that, in essence, Mister -- Dr. Kesselring makes  
12 his own assumption and then proves why under that assumption  
13 it's false. But let me read to you what Paragraph 21 of the  
14 Orchard Drive affidavit actually says.

15 "AKB48 and 5F-AKB48 belong to a structural class with  
16 a core indazole structure." Okay?

17 I think the neutral Magistrate believes that the  
18 agent who presents that and says, "I know this," knows that.  
19 There's no indication anywhere from his training and  
20 experience or anything else that he cites how he could know  
21 that. Now let me go on.

22 "They are structurally related to other synthetic  
23 cannabinoids with a core indole structure, such as the  
24 Schedule I substances JWH-018 and AM2201." Just listen to  
25 that a second and then ask yourself when he says -- Why would

1 he assume that there -- they're suggesting they're related to  
2 JWH-018 and AM2201? That's what he just said in the sentence.  
3 The affidavit just said they are structurally related.

4 Now one of the criticisms that Dr. Kesselring has of  
5 that is that the term "structurally related" is essentially  
6 meaningless. It's not the same as what the statute requires.  
7 It's one of these -- I call it sort of an -- It's unfair, but  
8 the words coming to my mind, it's a "sleight of hand" kind of  
9 expression. They're supposed to be substantially structurally  
10 similar, so a substantially-similar structure. That's not  
11 exactly, he points out, the same as structurally related.

12 But he goes on to take apart other aspects of  
13 Paragraph 21. I don't believe because Mr. Delworth can make  
14 arguments about this, without himself citing -- And I thought  
15 it was interesting that he gave a very brief chemistry  
16 lecture. I didn't learn anything. I'm too stupid to learn  
17 anything from it, but I suspect had the affiants in this case  
18 cited to how many DEA chemists must there be that testify for  
19 Congress that come up with all of these findings that either  
20 stay ahead of the curve, fall behind the curve, whatever, who  
21 are experts on these chemical compounds, why do we have an ICE  
22 agent or an IRS agent and a Postal agent and none of them can  
23 cite to in their affidavit or simply say to the -- to the  
24 Judge, "When I say I know that these belong to a structural  
25 class with a core indazole structure, when I as a -- as an

1 agent tell you that, Judge, here's how I know that: Because  
2 the DEA's Report 2263 instructs me on that."

3 They could have simply said why -- where they had a  
4 source that educated them on that because as Dr. Kesselring  
5 says, absent that level of education from somewhere, from some  
6 noted text, that, you know, maybe would survive *Daubert* kind  
7 of considerations, we'd of -- we'd of -- you as a Magistrate  
8 could have had comfort in thinking: This is likely truthful;  
9 it has foundation.

10 There is almost a great effort to develop very  
11 massive affidavits with massive chemical references without  
12 any reference to the knowledge of that Chemistry. And the  
13 point is: When the Magistrate reads it, when I read it, I see  
14 it's very compelling if you don't understand it. We've  
15 brought to the table today some understanding of it by way of  
16 an affidavit, a declaration, if you will. I think it's  
17 sufficient with all -- And I'm sorry to say it is nine pages  
18 in length, Dr. Kesselring's affidavit. I don't think there  
19 will be any way -- I didn't even hit the highlights of the  
20 substance of this -- that the Court will be able to analyze  
21 this -- I'm sorry -- as you've already indicated without  
22 having to read Dr. Kesselring's declaration because he's a  
23 scientist.

24 THE COURT: Well, of course, I'm going to read his  
25 declaration carefully, and I have already -- I have already



1 perused it. So you can assume the Court will do --

2 MR. LUCCO: It's just ---

3 THE COURT: -- what's necessary to give all parties a  
4 fair determination of this matter.

5 MR. LUCCO: And because of that, Your Honor, there's  
6 no point in me reciting from that. I just wanted to hit the  
7 highlights. But I think when you -- when you do, there will  
8 be an overwhelming sense of what was missing and how it -- and  
9 you would think how could it have been done and the reckless  
10 nature of the characterizations they made.

11 At this point our burden is to show a substantial  
12 preliminary showing so that we can have a hearing and we could  
13 expect -- explore what was the basis for this knowledge,  
14 whether we see it in here, whether you actually had it from  
15 some source. We can explore that, and the Court could then  
16 make that determination, Judge.

17 THE COURT: Okay.

18 MR. LUCCO: Thank you.

19 THE COURT: All right.

20 MR. BOROWIAK: Your Honor, I will be brief with my  
21 response.

22 THE COURT: All right.

23 MR. BOROWIAK: Judge, one of the things that  
24 Mr. Delworth mentioned, and I know the Government mentioned in  
25 its response to the Defendants' Joint Motion to Suppress, is

1 that the substances we're dealing with are, in fact,  
2 controlled substances. And I can tell the Court that as we  
3 stand here today in May of 2016, that the great majority of  
4 the substances that are inside of those affidavits that we  
5 presented are either emergency controlled or scheduled  
6 substances. But dates are very important when you review  
7 these -- these affidavits because at times they are, in fact,  
8 analogues. They are made, you know -- They are, in fact,  
9 considered to be analogues or, you know, they may be emergency  
10 scheduled.

11 For example, Mr. Delworth pointed out in the  
12 Government's Exhibit 2 or -- excuse me -- Government's Exhibit  
13 1, the Orchard Drive affidavit, that it provided the reference  
14 to AKB48 and XLR11. The first reference to AKB48, which was  
15 seized in March of 2013, was not emergency scheduled until May  
16 of 2013. The same thing with XLR11, Your Honor. That XLR11  
17 was seized in April of 2013 but was not actually listed,  
18 emergency scheduled until May of 2013.

19 Additionally, Your Honor, there are references to  
20 other substances all throughout the affidavits, such as PB-22  
21 and AB-FUBINACA and AB-PINACA, and those, in fact, were not  
22 emergency scheduled until January of 2014.

23 So when the Court reviews the affidavits, it's very  
24 important to keep in mind those dates. And that's why when I  
25 was up here earlier, I had mentioned that what we're dealing

1 with, they are moving targets of three different  
2 classifications. It's also one of the things we pointed out  
3 in our motion for a bill of particulars.

4 But it's basically: Is it a controlled substance --  
5 considered a controlled substance analogue, which requires the  
6 802(32)(A) analysis, or is it an emergency scheduled or is it  
7 actually scheduled in the Controlled Substances Act?

8 The scientific language that Mr. Lucco was discussing  
9 is so important just because without it, you can't say that  
10 the substances at issue that they're considering to be  
11 analogues fulfill the requirements of 802(32)(A). And without  
12 that, you know, you have the rest of the investigation where  
13 they're talking to potentially a confidential informant or  
14 showing money being exchanged between groups and individuals.  
15 But without that ability to say it is a controlled substance  
16 of some sort or a violation of the law, that nefarious conduct  
17 that they're attempting to point to doesn't exist. In  
18 essence, there's no nefarious light on the conduct being  
19 described. And that, in essence, is why after the language is  
20 removed pursuant to *Franks*, the affidavits themselves fail.

21 THE COURT: Okay.

22 MR. DELWORTH: If I may.

23 THE COURT: Very briefly.

24 MR. DELWORTH: Yes. Mr. Borowiak indicated that  
25 XLR11 and AKB -- AKB48 in terms of when they were emergency

1 scheduled or scheduled in 2013. The affidavit itself refers  
2 to their seizure prior to that. This affidavit was for  
3 September of 2013. So we make references to earlier seizures  
4 of these drugs, but by the time this affidavit is filed, these  
5 have all been either scheduled or emergency scheduled. So at  
6 the time of this affidavit, you don't have to go back and  
7 determine are they controlled substances at all because  
8 they've already been -- they've already been scheduled; maybe  
9 not at the time initially seized but at the time that this  
10 affidavit referring to those earlier seizures had been issued,  
11 yes, they -- yes, they have. I just want to make that one  
12 correction. Thank you.

13 THE COURT: All right. Any dispute with that?

14 MR. BOROWIAK: No, Your Honor.

15 THE COURT: All right. All right. Thank you, all,  
16 very much. I have -- I have received as exhibits in today's  
17 hearing Government Exhibits 1, 2 and 3 which I believe they  
18 were given to the Court as what Dr. Kesselring referred to.

19 MR. DELWORTH: Yes. They've already been -- They're  
20 already with the Court as part of Defendants' exhibits. What  
21 you have, there's been a modification. What I've done is I've  
22 stickered and highlighted the -- what Dr. Kesselring, in his  
23 affidavit, what he challenges in each of those respective  
24 affidavits.

25 THE COURT: Okay. All right. The -- But there still

1 are 28 more --

2 MR. DELWORTH: Which ---

3 THE COURT: -- affidavits.

4 MR. DELWORTH: Yes. Well, ---

5 THE COURT: Or search warrant cases.

6 MR. DELWORTH: Search warrants but some of the  
7 affidavits, like Orchard Drive, encompass about seven or eight  
8 search warrants. And all of those -- And all of those,  
9 everything is part of the defense's exhibits to the motion.

10 THE COURT: All right. Well, let me ask you and ---

11 MR. DELWORTH: Dr. Kesselring just challenged those  
12 three specific affidavits. So that's -- that's why I utilized  
13 those.

14 THE COURT: All right. I -- You know, without having  
15 to read all 31 to -- to know whether or not this is accurate,  
16 let's just say Exhibit 1, today's Exhibit 1, Government  
17 Exhibit 1, the affidavit of Wayne House, what I think you're  
18 saying is that this document was used as a basis for, which is  
19 not unusual, a basis for more than one search warrant.

20 MR. DELWORTH: Yes, Your Honor.

21 THE COURT: And which -- Can you tell me which?

22 MR. DELWORTH: It's actually in the page -- If you, I  
23 think, page a couple in, it will indicate that, "This search  
24 warrant is in support of," and it will have -- there's  
25 listings -- there's a Williams -- I think it's a Williamsburg

1 address, and then the other ones, besides Orchard Drive, are  
2 going to be various suite numbers on St. Charles Rock Road.

3 THE COURT: I see 1901 Williamstown Drive.

4 MR. DELWORTH: Right.

5 THE COURT: I see 13761 St. Charles Rock Road, 13765  
6 St. Charles Rock Road, different suites. Well, what I'm going  
7 to do, and I'll want counsel to agree to it before you leave:  
8 Do you have copies of the warrants with the case numbers?

9 MR. DELWORTH: Yes, Your Honor. I can provide --  
10 It's upstairs, but I can -- I've got all that. I can provide  
11 it as part -- It's in the Government's -- It's in the defense  
12 exhibits. I'm sorry. I just copied the relevant portion of  
13 the affidavit. It's -- They were filed -- Defendants'  
14 exhibits basically included the searches, seizure warrant with  
15 the -- with the case numbers. And what Mr. Lucco has handed  
16 to me as a Government Exhibit 10 of their -- yeah, excuse me;  
17 I said "Government" -- Defense Exhibit 10, as part of the  
18 defense motions, they have a chart indicating the exhibit, the  
19 warrant number and the location searched. If I may hand this  
20 to the Court, --

21 THE COURT: All right.

22 MR. DELWORTH: -- I think it would be easier. If you  
23 saw it, I think it would be self-explanatory.

24 THE COURT: Okay.

25 MR. LUCCO: And, Your Honor, it is part of the -- of

1 our motion.

2 THE COURT: Okay. Can I have this?

3 MR. LUCCO: Sure, Your Honor.

4 THE COURT: All right. Thank you. I appreciate  
5 that. Now there's a -- Well, there's one handwritten change.  
6 Well, there are a couple of handwritten changes. I'll look  
7 for it in the ---

8 MR. LUCCO: We'll make you a clean copy.

9 THE COURT: Well, if it's ---

10 MR. BOROWIAK: I think I probably have one.

11 THE COURT: Okay. All right.

12 MR. LUCCO: Are you done, Jim?

13 MR. DELWORTH: Yeah.

14 MR. LUCCO: The only thing I wanted to comment,  
15 Your Honor, when Jim introduced that exhibit, which is the  
16 House affidavit, and he has the three tabs on it, and -- and  
17 those tabs have some highlighting. I did not know he was  
18 going to represent that was the only criticisms, the only  
19 paragraphs that Dr. Kesselring criticizes, because I would  
20 take exception to that. In particular, Dr. Kesselring,  
21 Paragraph 11 of his affidavit, takes exception to all the  
22 paragraphs 16 through 21. So those he doesn't -- He's marked  
23 21 but not 16, 17, 18, 19 and 20. I just point that out. I  
24 didn't want to be deemed to have -- agreeing those are the  
25 only sections Dr. Kesselring was challenging.

1 THE COURT: Okay.

2 MR. DELWORTH: Yeah. Well, he challenges on those as  
3 basically the expertise of the affiant with respect to setting  
4 forth the information in those. But what I've highlighted are  
5 the specific indications of what he believes were misleading,  
6 but he does do a general attack of all the paragraphs within  
7 that in terms of the affiant's experience. Thank you.

8 THE COURT: Okay. All right. Do you have a clean  
9 copy here of that exhibit and that document?

10 MR. LUCCO: Hold on. I think I do.

11 MR. DELWORTH: Judge, I've actually got a clean copy  
12 of that. Here's -- Okay. It was in a binder, so.

13 THE COURT: Okay. I will mark this. It is  
14 identified on its face as being received or taken from the  
15 Court CM/ECF system, and it bears the legend case number,  
16 4:14-CR-175, Document No. 227-10, filed March 9, 2016; nine  
17 pages in length. And that document itself bears the caption  
18 "Exhibit 10, Summary Comparison Of Search Warrant Affidavits."  
19 I'll -- I'll just further mark it as Defense Joint Exhibit A  
20 for the record. All right.

21 All right.

22 MR. DELWORTH: Judge, may I have just one -- one --  
23 another clarification?

24 THE COURT: Yes.

25 MR. DELWORTH: This was -- The defense motion, such



1 as Charles Wolfe is charged in two separate -- two separate  
2 indictments, was -- was this hearing to encompass the other  
3 case, too, involving the same motions and the attack of the  
4 same search warrants with respect to Mr. Wolfe?

5 I know that was -- was actually referred to Judge --  
6 Judge Collins, --

7 THE COURT: Right.

8 MR. DELWORTH: -- the Magistrate Judge.

9 THE COURT: Right. No. The only -- Each of the  
10 three Magistrates or the Magistrates to whom the cases were  
11 referred initially do their own, and they make take a lead  
12 from somebody else who does --

13 MR. DELWORTH: Okay.

14 THE COURT: -- who reaches the issues first; they may  
15 not. I don't know.

16 MR. DELWORTH: Okay. So we need to take that up with  
17 Judge Collins. I just wanted clarification.

18 THE COURT: Yeah. If that's not -- If I'm -- my  
19 recollection is corrected otherwise, then counsel will be  
20 advised.

21 MR. DELWORTH: Thank you.

22 THE COURT: All right. Thank you very much. Yes,  
23 sir.

24 MR. BOROWIAK: Yes, sir, Your Honor, before we  
25 adjourn.

1 THE COURT: Yes.

2 MR. BOROWIAK: I think one of the things that were  
3 discussed last week at our brief meeting, we had brought up  
4 the point that we had filed four Motions to Suppress; one  
5 pursuant to McFadden, one pursuant to Johnson -- or excuse me;  
6 Motions to Dismiss. Thank you, Your Honor.

7 We had asked the Court or mentioned to the Court at  
8 the hearing and asked for leave to file supplemental briefing  
9 on those motions that we previously filed. At this point we  
10 would just like to make that motion and ask the Court for  
11 leave to file supplemental briefing with regards to those  
12 previously-filed Motions to Dismiss.

13 THE COURT: Okay. Why -- Why do you need more  
14 briefing?

15 MR. BOROWIAK: And it was partly because they  
16 referenced McFadden and Johnson, Your Honor, and there have  
17 been some developments in the case law on those matters.

18 THE COURT: Okay.

19 MS. GRANGER: The only thing I would point out,  
20 Your Honor, they -- when we filed our response, there were  
21 actually several replies to our response. So I would just ask  
22 what time period you're looking at because I believe you all  
23 filed a reply to the response in December. Are you talking  
24 about developments since then?

25 I would just ask that it be confined to that then

1 because I think they've had an opportunity to reply to our  
2 response. So I'm unsure of what additional you have.

3 MR. BOROWIAK: That's -- That's what it would be,  
4 developments since that time, Your Honor.

5 THE COURT: You're talking about two cases that have  
6 been decided since the last filing?

7 MR. BOROWIAK: Yes. Yes. We're talking about  
8 McFadden and Johnson and then developments on them since we  
9 filed our replies to the Government's reply to our initial  
10 motion.

11 THE COURT: Okay. You can have a week from today --

12 MR. BOROWIAK: Okay.

13 THE COURT: -- to file something. Keep it at ten  
14 pages or less, and the Government will have a similar calendar  
15 week to respond.

16 MS. GRANGER: Thank you, Your Honor.

17 MR. BOROWIAK: And, Your Honor, there's one more  
18 thing. I apologize.

19 THE COURT: Yes, sir.

20 MR. BOROWIAK: I believe Mr. Threlkeld and  
21 Mr. Delworth discussed the option for the defense counsels to  
22 file replies to the Government's replies to our *Franks* motion  
23 and our Motion to Suppress. We would just be asking the Court  
24 for time to file a reply in order to file a reply to the  
25 Government's reply.

1 THE COURT: Why? What more would you possibly add?

2 MR. BOROWIAK: Your Honor, we had initially planned  
3 to file a reply. However, you know, as we were working with  
4 the group and we had lost another attorney whose client had  
5 pled previously, we've sort of reorganized and restructured  
6 ourselves as to what we're doing, and we just require one more  
7 week to reply to the actual motions that the Government had  
8 filed.

9 THE COURT: You're talking about your motion, their  
10 response.

11 MR. BOROWIAK: Right. And then our response to their  
12 response, Your Honor.

13 THE COURT: Your reply, their surreply, I suppose.

14 MR. BOROWIAK: Right.

15 THE COURT: And now -- I think I've -- I think it's  
16 adequately briefed.

17 MR. BOROWIAK: Okay. Thank you, Your Honor.

18 THE COURT: Thank you very much. We'll be in recess.

19 (Hearing adjourned at 11:15 AM.)  
20  
21  
22  
23  
24  
25

CERTIFICATE OF OFFICIAL REPORTER

I, Deborah A. Kriegshauser, Federal Official Realtime Court Reporter, in and for the United States District Court for the Eastern District of Missouri, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 8th day of June, 2016.

/s/ Deborah A. Kriegshauser

---

DEBORAH A. KRIEGSHAUSER, FAPR, RMR, CRR  
FEDERAL OFFICIAL COURT REPORTER